NO. 47641-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

OLYMPIC STEWARDSHIP FOUNDATION, J. EUGENE FARR, WAYNE AND PEGGY KING, ANNE BARTOW, BILL ELDRIDGE, BUD AND VAL SCHINDLER, RONALD HOLSMAN, CITIZENS' ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY, CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE TRUST, CRAIG DURGAN, and HOOD CANAL SAND & GRAVEL LLC d/b/a THORNDYKE RESOURCE,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE HEARINGS OFFICE, acting through the WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON COUNTY,

Respondents.

HOOD CANAL COALITION,

Respondent/Intervenor.

DEPARTMENT OF ECOLOGY'S ANSWER TO PACIFIC LEGAL FOUNDATION'S AMICUS BRIEF

ROBERT W. FERGUSON
Attorney General
Sonia A. Wolfman
Assistant Attorney General
WSBA #30510
PO Box 40117, Olympia WA
(360) 586-6764

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I. INTRODUCTION

Amicus Pacific Legal Foundation (PLF) contends that the Growth Management Hearings Board (Board) erred in approving Jefferson County's updated Shoreline Master Program (SMP). PLF echoes the argument of Olympic Stewardship Foundation (OSF) that the Board erroneously interpreted and applied the well-established concepts in the Guidelines requiring that SMP's seek "no net loss" of ecological functions. PLF, like OSF, relies on abstract ideological arguments that have no basis in law, and without any consideration of the actual language of the SMP. Further, as Jefferson County notes in its answer to PLF's brief, "it appears that PLF submitted its amicus brief in this appeal without carefully reviewing the extensive administrative record." County's Answer at 9.

PLF selectively quotes portions of the Shorelines Management Act (SMA), and its associated legislative history, in an attempt to create controversy where none exists. The SMA's legislative findings and purpose are clear, and this court need not resort to additional tools of statutory construction in order to determine the true meaning of the statute. Nevertheless, it bears clarifying that PLF's revisionist take on the SMA miscasts the law as a legislative attempt to prioritize private property rights, when in reality the SMA's overarching goal is to protect the shorelines of the state by planning and regulating for appropriate use and development.

PLF either misunderstands or mischaracterizes the Guideline requirement of no net loss of ecological functions by reading it to preclude any impacts from new development. In following the framework for meeting no net loss that is established in the Guidelines, the SMP gives full effect to all of the policy goals of RCW 90.58.020. The SMP protects shoreline ecological functions while planning for and fostering the SMA's priority uses. PLF fails to prove that the nexus and proportionality test applies to the SMP, but even if it does, the use provisions in the SMP clearly meet it.

II. ARGUMENT

A. PLF Repeats Arguments Raised in OSF's Opening Brief

Amicus briefs should address only issues not already briefed by the parties. *Gomez v. Sauerwein*, 180 Wn.2d 610, 624, 331 P.3d 19 (2014). This court may disregard several portions of PLF's amicus brief that simply repeat matters raised in OSF's opening brief. *See* RAP 10.3(e). For example, PLF repeats arguments made by OSF related to no net loss and nexus and proportionality. *Compare* Amicus Br. of Pacific Legal Foundation (Amicus Br.) at 9-17 with Opening Br. of Petitioners at 32-37. "The purpose of an amicus brief is to help the court with points of law." *Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005). The only new information in PLF's brief pertains to the legislative history of the SMA, which is largely irrelevant because the

meaning of the SMA is clear from the plain language of the statute and the implementing Guidelines.

B. The Legislative History of the SMA

1. The Court need not resort to legislative history to determine the intent of the SMA

PLF is correct insofar as it argues that the SMA "represents a compromise between the interests of government, environmentalists, business interests, and property owners." Amicus Br. at 3. However, PLF significantly mischaracterizes the policy priorities that emerged as a result of that compromise, and unnecessarily scours legislative history in an attempt to make its version of property rights, rather than shoreline protection, the law's overarching goal. The plain language of the SMA evidences the legislature's intent to enact a comprehensive scheme to protect state shorelines, and this Court need go no further in its analysis in order to give effect to that intent.

If a statute's meaning is plain on its face, a court gives effect to that plain meaning as the expression of what the Legislature intended. *Tracfone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Courts will normally only resort to extrinsic aids of interpretation, such as a statute's legislative history and the circumstances surrounding its enactment, if a statute appears ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 306, 268 P.3d 892 (2011). A statute is ambiguous if it is susceptible to two or more reasonable interpretations, but ambiguity does not arise simply because a statute

could conceivably have different interpretations. *City of Seattle v. Holifield*, 170 Wn.2d 230, 240, 240 P.3d 1162 (2010).

In enacting the SMA, the Legislature sought first and foremost to preserve and protect the natural condition of Washington's shorelines by confronting the "ever increasing pressures of additional uses" of the shorelines. RCW 90.58.020. Unlike some statutes, the SMA contains a detailed purpose and findings section, which clarifies its three primary goals: (1) protecting state shorelines, (2) enhancing public access and enjoyment of shorelines, and (3) prioritizing water dependent uses and single family residences "in those limited instances" when alterations of the natural condition of the shoreline are authorized. RCW 90.58.020; *see also Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 244, 189 P.3d 161 (2008); *Overlake Fund v. Shorelines Hearings Bd.*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998). The Act is explicit on this topic: "coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest," but nevertheless, "unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest." RCW 90.58.020.

Accordingly, the SMA establishes coordinated planning and permitting requirements, managed by state and local authorities, "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. Local jurisdictions draft a

Shoreline Master Program (SMP), which Ecology reviews for consistency with the SMA and agency guidelines that set forth the minimum requirements of an SMP. RCW 90.58.090(2), (7); *see generally* WAC 173-26. Moreover, all SMPs must be "developed in accordance with the policies enunciated in RCW 90.58.020." RCW 90.58.030(3)(c).

Consistent with basic principles of statutory interpretation, this court need look no further than the plain language of the SMA to identify the statute's intend and purposes. PLF's foray into legislative history is both unnecessary and should be rejected as inconsistent with express policy statements of the Act.

2. The SMA's legislative history supports affirmation of the SMP

Even if this Court discerned ambiguity in the purpose and goals of the SMA, the legislative history and initiative process surrounding its passage support the Board's interpretation of the SMA and approval of the Jefferson County SMP.

When examining the legislative history of a statute, this Court may examine final bill reports, lawmaker statements on the floors of the House and Senate, and before standing committees, and the governor's veto message, if one exists. *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 195-96, 207 P.3d 1251 (2009); *In re Marriage of Kovacs*, 121 Wn.2d 795, 807-08, 854 P.2d 629 (1993); *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 594, 957 P.2d 1241 (1998). The rules of statutory construction apply equally to voter initiatives. *Amalgamated*

Transit Union Local 587 v. State, 142 Wn.2d 183, 205, 11 P.3d 762 (2000), *as amended* (Nov. 27, 2000), *opinion corrected*, 27 P.3d 608 (Wash. 2001). When the voters' intent is clearly expressed in the statute, the Court is not required to look further. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n of Wash.*, 133 Wn.2d 229, 241, 943 P.2d 1358 (1997). If there is ambiguity, courts may analyze statements in the voters' pamphlet in order to determine the voters' intent. *Amalgamated Transit*, 142 Wn.2d at 205-06.

PLF presents the SMA as the Legislature's pro-development response to a "stringent environmental proposal" brought by the Washington Environmental Council (WEC) in an effort to prod the Legislature into enacting comprehensive shoreline regulations. Amicus Br. at 4 (internal quotation marks omitted). In fact, it was the uncertainty created by our Supreme Court's decision in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), that prompted stakeholders from both the developer and environmentalist communities to urge legislative action defining the scope of permissible development in shoreline areas. *See* Ralph W. Johnson, et. al., *The Public Trust Doctrine in Washington State*, 67 Wash. L. Rev. 521, 537 (1991); Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423, 425-26 (1974).

In *Wilbour*, the court created statewide uncertainty regarding the status of fill and other development in navigable waters when it concluded that the judicial branch was ill-suited to grant authority to a property owner on Lake Chelan who wanted to retain fill that affected public rights

of navigation.[1] *Wilbour*, 77 Wn. 2d at 317-18. After the Legislature failed to pass any meaningful legislation in the wake of *Wilbour*, the Washington Environmental Council (WEC) submitted Initiative Measure 43 to the 1971 Legislature. Crooks, *supra* at 424. The Legislature took no action on Measure 43, and in response Governor Dan Evans requested that the House Committee on Natural Resources and Ecology take up his own proposal, Substitute House Bill 584 (SHB 584). Final Bill Report, ESHB 584, 42nd Leg. (1971); *see also* Jim Van Nostrand, *Shoreline Management Poses Many Questions*, The Columbian, Mar. 5, 1971, at 6.

Most floor debates and amendments to SHB 584 focused on questions of local versus state regulation and enforcement, the size of shoreline jurisdiction zones, and the role of the Department of Natural Resources (DNR) in regulating shorelands owned and managed by the State. Crooks, *supra* at 424; *see also* House Journal, 42nd Leg., Ex. Sess., at 1238-41 (Wash. 1971), Senate Journal, 42nd Leg., Ex. Sess., at 1408-10

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[1] Footnote 13 of the opinion states in part:

> We are concerned at the absence of any representation in this action by the Town or County of Chelan, or of the State of Washington, all of whom would seem to have some interest and concern in what, if any, and where, if at all, fills and structures are to be permitted (and under what conditions) between the upper and lower levels of Lake Chelan. There undoubtedly are places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate. This presents a problem for the interested public authorities and perhaps could be solved by the establishment of harbor lines in certain areas within which fills could be made, together with carefully planned zoning by appropriate authorities to preserve for the people of this state the lake's navigational and recreational possibilities. Otherwise there exists a new type of privately owned shorelands of little value except as a place to pitch a tent when the lands are not submerged.

Id. at 316.

(Wash. 1971). However, there was ample discussion regarding the harm of "unrestricted construction" in the shoreline. Senator Gissberg explains: "we are just saying that the state as a whole and the legislature specifically believes that there ought to be a handle on construction. That unrestricted construction for any purpose, for any reason, for any activity should be circumscribed and controlled." Senate Journal, 42nd Leg., Ex. Sess., at 1413 (Wash. 1971). The result of these debates is a law whose "basic policy is neither to prescribe nor to proscribe uses, but to plan and regulate." Crooks, *supra* at 460. Finally, Governor Evans resolved any lingering doubts about the purpose of the SMA in a veto message accompanying the final session law:

> Substitute House Bill 584 is one of the most significant pieces of legislation ever passed by the state legislature. It is a clear indication of the commitment of the people of the state, acting through the legislative process to assure the future environmental quality of this state. With the passage of Substitute House Bill 584 and with what I hope will be the approval of the people at the next general election this state will lead the nation in its care and concern for its waterfront areas.

Laws of 1971, 1st Ex. Sess., ch. 286, at 1515.

C. The SMA Prioritizes Shoreline Protection Through Coordinated Planning and No Net Loss

The SMA "shall be liberally construed to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900. Washington courts have consistently held that this liberal construction is meant "to protect the state shorelines as fully as possible." *Bellevue Farm*

Owners Ass'n v. Shorelines Hearings Bd., 100 Wn. App. 341, 351, 997 P.2d 380 (2000) (quoting *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994)); *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 337, 969 P.2d 1072 (1998); *English Bay Enterprises, Ltd. v. Island Cty.*, 89 Wn.2d 16, 20, 568 P.2d 783 (1977). The SMA expressly states that "unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the public interest" and makes it clear that the shoreline environment must be protected from the impacts of development:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. *This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.*

RCW 90.58.020 (emphasis added). "Alterations of the natural condition of the shorelines of the state, *in those limited instances when authorized*," should favor water dependent uses and single family residences. RCW 90.58.020 (emphasis added); *Buechel,* 125 Wn. 2d at 209.

In accord with these SMA policy statements, a local jurisdiction is obligated to prepare a SMP that "shall contain policies and regulations that assure, at minimum, no net loss of ecological functions necessary to

sustain shoreline natural resources." WAC 173-26-201(2)(c); *see also* RCW 90.58.620. However, development and uses that are consistent with the policies and provisions of the SMP are allowed. Both PLF and OSF characterize no net loss as precluding development, but this is inaccurate. The requirements of no net loss as set forth in the Guidelines governing updating of SMPs is clear: it does not prohibit development impacts.

> The concept of "net" as used herein, recognizes that any development has potential or actual, short-term or long-term impacts and that through application of appropriate development standards and employment of mitigation measures in accordance with the mitigation sequence, those impacts will be addressed in a manner necessary to assure that the end result will not diminish the shoreline resources and values as they currently exist.

WAC 173-26-201(2)(c).

PLF seems to overlook how each SMP is a comprehensive use plan, including use regulations and development standards, for all shorelines, and that each SMP is "developed in accordance with the policies enunciated in RCW 90.58.020." RCW 90.58.030(3)(c). *See generally Buechel* 125 Wn.2d at 203-04. Similar to a local comprehensive plan and zoning code, a SMP divides the shoreline into various "environments" and establishes use and development standards for each environment. *See* WAC 173-26-201(3)(f); *Batchelder v. City of Seattle*, 77 Wn. App. 154, 159, 890 P.2d 25 (1995). Within each environment, certain uses and development are allowed or conditioned, while others are prohibited. With regard to the no net loss policy, a SMP must include: (1)

appropriate shoreline environment designations that are based on existing shoreline conditions and use patterns; (2) provisions to address impacts of common shoreline uses and development; (3) provisions that address the critical areas within the shorelines; and (4) provisions for mitigation measures and methods to address unanticipated impacts. WAC 173-26-201(2)(c).

As Ecology and the Board found, the SMP here meets all of these criteria. Based on a thorough Shoreline Inventory and Characterization (i.e., "baseline"), the SMP establishes shoreline designations to suit different types of shorelines, from those that are or could be developed for high intensity uses, including water dependent development (High Intensity), to those areas that are dedicated to residential development (Residential), to those that have relatively intact ecological functions but are still able to accommodate low intensity uses (Conservancy), to those shoreline areas that are most sensitive to disturbance and provide the highest level of ecosystem function (Natural). CP 6459. For each designation, the SMP contains "environment-specific regulations" that take into account the shoreline conditions and address the "[t]ypes of shoreline uses permitted, conditionally permitted, and prohibited." WAC 173-26-211(4)(a)(iv); Clerk's Papers (CP) 6016-18 (SMP, Art. 4, Table 1); *see also Overlake Fund* at 762 ("different zoning classifications and shoreline designations are designed to provide different levels of protection for shorelines.") In addition, the SMP has provisions to protect

critical areas in shorelines, and requires mitigation to address site-specific impacts. CP 6021-24 (SMP, Art. 6.1).

PLF's lack of familiarity with the record and nature of a SMP is apparent when PLF argues that the SMP is not predicated on any baseline. Amicus Br. at 16. PLF is evidently unaware of the provisions in the Guidelines that require a local government to inventory existing shoreline conditions and characterize ecological functions and ecosystem-wide processes. *See* WAC 173-26-201(3)(c), (d). PLF overlooks the Shoreline Inventory and Characterization that the County prepared pursuant to these requirements. CP 4471, 6573. As described in detail in the County's Answer and Ecology's Response Brief, the County inventoried existing conditions along the County's 250 miles of marine shorelines, 22 miles of lake shorelines, and more than 742 miles of river shorelines. CP 6237; *see* County's Answer at 6-8, Ecology's Response at 13-14, 19-20. For each reach, the County cataloged the nearshore/freshwater processes; the physical environment; the biological resources; land use and altered conditions; public access; and any restoration opportunities. CP 6224-6564. "The intent of the shoreline reach-scale analysis is to identify how existing conditions at or near the shoreline have responded to watershed alterations, and how alterations have affected the functions and values of the SMA-regulated shorelines." CP 6237. The Shoreline Inventory and Characterization is the baseline that both PLF and OSF contend is lacking.

When read as a whole, RCW 90.58.020 contemplates a master program that, through all of its tools gives effect to the goals and use

preferences therein. These tools include inventories, land use plans, specific regulations, mitigation requirements, and provisions facilitating and encouraging restoration. If the SMP overall sets aside areas for protection of ecological functions, for water dependent uses, residential uses, and public access, and its mitigation policies meet the requirement of preserving and protecting state shorelines by ensuring "no net loss" of ecological functions, then the SMP complies with the SMA. *See* WAC 173-26-201(2)(d). Because the Jefferson County SMP gives full effect to the policies of RCW 90.58.020, it must be affirmed.

D. To the Extent the Question is Ripe and Applies in a Facial Challenge to an SMP, the SMP Buffer Requirements Meet Constitutional Nexus and Proportionality Tests that Apply in Certain Permitting Contexts to Ensure that Private Property is Not Taken Without Just Compensation

Well-established case law provides, as the Board stated, that "private property rights are secondary to the SMA's primary purpose, which is 'to protect the shorelines as fully as possible.'" CP 7532 (FDO at 80); *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (citing *Lund*, 93 Wn. App. at 336-37), (quoting *Buechel*, 125 Wn.2d at 203). Such statements may concern PLF, but neither the Board's statement nor the cases suggest that the SMP ignores or tramples on constitutionally protected private property rights.

As noted by the Board, the County conducted a thorough takings analysis to ensure that the SMP can be implemented consistent with relevant constitutional limits on the regulation of private property.

CP 7535-37 (FDO at 83-85); WAC 173-26-186(5), (8)(b)(i). There are numerous mechanisms in the SMP that provide flexibility for this very purpose. *See* Department of Ecology's Response Brief at 25-26. For example, the SMP has no fewer than six ways to reduce a shoreline buffer, and four of these can be achieved without a shoreline variance permit. CP 6026-31 (SMP, Art. 6E). These provisions allow a buffer to be tailored to site-specific circumstances.

PLF makes no attempt to justify the application of the nexus and proportionality test to the SMP, which contains planning requirements, regulations, and potential variances to govern future permitting. Thus, it does not make a showing that the SMP should be tested by the concepts established in the cases that use nexus and proportionality to ensure that permitting conditions do not unconstitutionally take private property for public use without just compensation. *See Nollan v. Cal, Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L. Ed. 2d 304 (1994); *Koontz v. St. Johns River Water Management District,* ___U.S.___,133 S. Ct. 2586, 186 L.Ed.2d 697 (2013). In each of these three seminal cases, a permittee brought an "as applied" challenges based on a site-specific permitting decision in which the government was seeking to obtain an "exaction" of an easement or a monetary fee in exchange for permitting certain development. There is no basis in state or federal law to apply *Nolan/Dollan* to a SMP. *See* Ecology's Response at 22-25. Application of these tests when a party objects to an SMP on its face is illogical, too. In

the absence of a specific development proposal and specific development conditions, there is no way to asses whether there is a "nexus" between the conditions and the proposal, or whether the conditions are "roughly proportional" to the impacts.

However, even if it were possible to apply the *Nollan/Dolan* tests in this claim that the SMP is constitutional on its face, the SMP meets those criteria. The buffers in the SMP are based on "best available science" and "the most current, accurate, and complete scientific and technical information available." *See Olympic Stewardship Foundation (OSF) v. W. Wash. Growth Mgm't Hearings Bd. (WWGMHB),* 166 Wn. App. 172, 199, 274 P.3d 1040 (2012); WAC 173-26-201(2)(a). As the courts have repeatedly stated, "the science ensures that the nexus and proportionality tests are met." *OSF v. WWGMHB*, at 199, (citing *Honesty in Envtl. Analysis & Legislation (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999)); *see also Kitsap Alliance of Property Owners (KAPO) v. CPSGMHB*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011), *rev. denied*, 171 Wn.2d 1030 (2011), cert. denied 132 S. Ct. 1792, 182 L. Ed.2d 616 (2012). PLF's claim that the SMP is unconstitutional is both factually and legally flawed and should be rejected.

I. CONCLUSION

The Board's approval of the SMP should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

ROBERT W. FERGUSON
Attorney General

SONIA A. WOLFMAN,
WSBA #30510
Assistant Attorney General
Attorneys for Respondent
State of Washington,
Department of Ecology
(360) 586-6764
sonia.wolfman@atg.wa.gov

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Department of Ecology's Answer to Pacific Legal Foundation's Amicus Brief

Sender Name: Deborah Holden - Email: deborah.holden@atg.wa.gov

A copy of this document has been emailed to the following addresses:

dennis@ddrlaw.com
pjh@hirschlawoffice.com
kolouskova@jmmlaw.com
orrico@jmmlaw.com
dalvarez@co.jefferson.wa.us
mjohnsen@karrtuttle.com
mann@gendlermann.com

dionnep@atg.wa.gov

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v.

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Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on April 27, 2016, I caused to be served the Department of Ecology's Response Brief and Answer to Pacific Legal Foundation's Amicus Brief in the above-captioned matter upon the parties herein as indicated below CM/ECF system which will send notification of such filing to all parties of record as follows:

Duana T. Kolouskova Vicki Orrico 11201 Se 8th Street, Suite 120 Bellevue WA 98004	[ ] U.S. Mail [x] Email: kolouskova@jmmlaw.com
David Alvarez, Deputy Prosecuting Attorney For Jefferson County PO Box 1220 Port Townsend WA 98368	[ ] U.S. Mail [x] Email: dalvarez@co.jefferson.wa.us
Mark R. Johnsen Karr Tuttle Campbell 701 5th Avenue, Suite 3300 Seattle WA 98104	[ ] U.S. Mail [x] Email: mjohnsen@karrtuttle.com
Dennis D. Reynolds 200 Winslow Way West, Suite 380 Bainbridge Island WA 98110	[ ] U.S. Mail [x] Email: dennis@ddrlaw.com
Paul J. Hirsch Hirsch Law Office Po Box 771 Manchester WA 98353	[ ] U.S. Mail [x] Email: pjh@hirschlawoffice.com
David Mann Gendler and Mann LLP 615 Second Avenue Suite 560 Seattle WA 98104	[ ] U.S. Mail [x] Email: mann@gendlermann.com

I further certify that on the April 28, 2016, I caused to be served the Department of Ecology's Response Brief and Answer to Pacific Legal Foundation's Amicus Brief on the following parties via e-mail:

Dionne Padilla-Huddleston
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

dionnep@atg.wa.gov

Brian T. Hodges
Ethan W. Blevins
Pacific Legal Foundation
10940 NE 33rd Pl St 210
Bellevue WA 98009

bth@pacificlegal.org;
ewb@pacificlegal.org

DATED this 28th day of April 2016 at Olympia, Washington.

DEBORAH A. HOLDEN, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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Deborah.Holden@atg.wa.gov